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Nos. 83-1013 and 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents;

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Third Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR AMICUS CURIAE SOUTHEASTERN FISHERIES ASSOCIATION, INC.

ELDON V.C. GREENBERG
(Attorney of Record)
Galloway & Greenberg
1835 K Street, N.W.
Washington, DC 20006
(202) 833-9084
Attorney for Amicus Curiae Southeastern Fisheries Association, Inc.

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MOTION OF THE SOUTHEASTERN FISHERIES ASSOCIATION, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

a. The Southeastern Fisheries Association, Inc. ("SFA") hereby moves for leave to file the attached brief *amicus curiae* in support of Respondents, pursuant to Supreme Court Rule

36.3. Petitioner Environmental Protection Agency ("EPA") and Respondent Natural Resources Defense Council, Inc. have consented to the filing of this brief. Their consent letters have been filed with the Clerk of this Court. The consent of Petitioner Chemical Manufacturers Association could not be obtained.

SFA is one of the oldest and largest commercial fisheries trade associations in the Southeastern United States. Organized in 1952 under the laws of the State of Florida, it is headquartered in Tallahassee, Florida. SFA has more than 400 members in all sectors of the commercial fishing industry from North Carolina to Texas. In addition to those directly involved in harvesting fishery resources, its members include processors, dealers, distributors, and suppliers to the fishing industry.

The Gulf and South Atlantic fisheries are among the Nation's most valuable. Shrimp, the major species from the region, is the highest value catch in the country, with landings in 1983 valued at approximately $486 million.[1] The total national economic impact of the South Atlantic and Gulf of Mexico commercial fisheries, including direct and indirect sales, was over $6 billion in 1980. Income related to this economic activity resulted in 142,854 person-years of employment.[2]

Protection of coastal waters and estuarine habitat is critical to the livelihood of SFA's members. Over 90 percent of the commercial fishery resources in the Southeastern United States is estuarine-dependent. Degradation of the Nation's marine and coastal waters could not only lead to decline in the overall productivity of the Gulf and South Atlantic fisheries, but to a decline in quality of fishery products, with substantial adverse effects on the economics of the industry.

[1] U.S. Department of Commerce, National Marine Fisheries Service, Fisheries of the United States, 1983, p. 11 (April 1984).

[2] Centaur Associates, Inc., Economic Impact of the Commercial Fishing Industry in the Gulf of Mexico and South Atlantic Region, p. 150 (Feb. 1984).

b. This case involves whether the Third Circuit correctly ruled that Section 301(l) of the Clean Water Act[3] precludes industrial facilities from increasing their discharges of toxic pollutants over those allowed in uniform national pretreatment standards by obtaining a "fundamentally different factor" variance. *National Association of Metal Finishers* v. *EPA*, 719 F.2d 624, 645-646 (3d Cir. 1983).

The discharge of toxic pollutants into the Nation's marine waters and estuaries is of special concern to SFA because of the threats posed by toxics to fisheries. Toxic pollutants, such as mercury and lead, are known to harm reproduction of aquatic species, including shrimp and oysters. These pollutants, and others such as copper and PCB's, bioconcentrate in the food chain, where commercial fish and shellfish are near the top. Bioconcentration over time can render valuable species, such as tuna and swordfish, unfit for human consumption.[4]

There are, of course, numerous industrial facilities in the Southeast which discharge, both directly or indirectly through publicly owned treatment works, into the waters on which SFA members depend for their livelihood. Variances have already been sought for plants located in the Gulf Coast states, including chemical, fertilizer, and electroplating facilities. Moreover, pretreatment standards have yet to be issued, or were recently issued, for several of the major industries with the potential to affect SFA members, including over 200 organic chemical or plastics manufacturers concentrated in Texas, Louisiana, Alabama, Florida, and Mississippi, and numerous petroleum refineries located along the Gulf. If the Third Circuit is reversed, and it is held that EPA has the power to grant variances, each of these facilities would be potentially eligible to dump more toxic pollutants into the fisheries than are allowed by the uniform national standards.

In sum, SFA and its members have a keen interest in

[3] 33 U.S.C. §1311(l).

[4] See generally Environmental Protection Agency, Ambient Water Quality Criteria for Copper, B-10, 12; Ambient Water Quality for Mercury, B-6, 7, C-20, 21; Ambient Water Quality for Lead, B-9; Ambient Water Quality for Polychlorinated Biphenyls, B-6 (EPA Series 440/5-80, October 1980).

assuring that the Clean Water Act is properly implemented to reduce toxic pollutant discharges into the waters of the Southeastern United States. This special interest in the protection of fishery resources and habitat is not represented in this proceeding.

Respectfully submitted,

Eldon V.C. Greenberg
(Attorney of Record)
Galloway & Greenberg
1835 K Street, N.W.
Washington, DC 20006
(202) 833-9084
Attorney for Amicus Curiae
Southeastern Fisheries
Association, Inc.

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BRIEF FOR AMICUS CURIAE SOUTHEASTERN FISHERIES ASSOCIATION, INC.

STATEMENT OF INTEREST OF AMICUS CURIAE

The Southeastern Fisheries Association, Inc. ("SFA") respectfully refers this Court to the foregoing Motion for

Leave to File Brief Amicus Curiae for a statement of its interest in this proceeding. This brief is filed in support of Respondents.

INTRODUCTION

This case reviews a decision by the Third Circuit holding that Section 301(l) of the Clean Water Act[1] bars the Environmental Protection Agency from granting "fundamentally different factor" ("FDF") variances from uniform national pretreatment standards for toxic pollutants. The foundation of the Third Circuit's decision was its view that a key purpose of the 1977 Amendments to the Clean Water Act, as evidenced by the legislative history, was to crack down on the discharge of toxic pollutants. *National Association of Metal Finishers v. EPA*, 719 F.2d 624, 645-646 (3d Cir. 1983).

More specifically, the threat to the Nation's fisheries played a major role in persuading Congress to spotlight toxics control in the 1977 Amendments. During the Senate debate, Senator Muskie, the principal author of the toxics control provisions, focused on fish kills and the presence of toxics in the aquatic environment. He warned that "concentrations of one or more of the heavy metals commonly exceeded suggested safe limits in the water column or in fish tissue at 17 sites," or 41 percent of those surveyed.[2]

Similarly, in discussing the Conference Report on the floor of the House, Congressman Roberts, the floor manager, emphasized that toxic pollutants not only "destroyed both commercial and sport fishing, but in many major water bodies they also constitute a hazard to aquatic environment and public health that has yet to be fully recognized." 1977 Legis. Hist at 327.

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[1] 33 U.S.C. §1311(l).

[2] See A Legislative History of the Clean Water Act of 1977, Cong. Research Service, Comm. Print No. 14, 95th Cong, 2d Sess., 863-864 (1978) (hereafter cited as "1977 Legis. Hist.").

ARGUMENT

THE CLEAN WATER ACT, AND PARTICULARLY THE 1977 AMENDMENTS, WERE DESIGNED TO RID THE NATION'S WATERS OF TOXIC POLLUTANTS, AND SHOULD BE CONSTRUED TO FOSTER THIS PURPOSE

From the outset, the Clean Water Act established a "national policy that the discharge of toxic pollutants in toxic amounts be prohibited. . . . " 33 U.S.C. §1251(a)(3). To achieve this goal, Congress initially established a separate procedure aimed at assuring more stringent effluent standards for toxic pollutants, and required that these toxic standards "provide an ample margin of safety," 33 U.S.C. §1317(a)(4)—a directive not applicable to other pollutants.

Nevertheless, little progress had been made in regulating toxic pollutants by the time Congress reexamined the Clean Water Act in 1977.[3] This, combined with mounting evidence of the harm caused by toxic chemicals in the environment, prompted Congress to make stringent and effective control of toxics a centerpiece of the 1977 Amendments.

Congressman Roberts called the toxics provisions "the highlight of this bill," and underscored "the increasingly evident toxics hazard." 1977 Legis. Hist. at 326. Senator Muskie cautioned that "the seriousness of the toxics problem is just beginning to be understood," and that "the nature of the toxics problem is so pervasive that the most effective approach in dealing with it is on an industry-by-industry basis." *Id.* at 863. Finally, in signing the 1977 Amendments, President Carter praised the bill for emphasizing "the importance of controlling toxic pollutants which endanger the public health." *Id.* at 181.

The Third Circuit's decision was faithful to this legislative history. Indeed, the Court began its discussion of the meaning of §301(l) by observing that "the elimination of the discharge of toxic pollutants has always received special emphasis under

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[3] See R. Hall, The Evolution and Implementation of EPA's Regulatory Programs to Control the Discharge of Toxic Pollutants, 10 Nat. Res. Law 507, 514-515(1977).

the Act," and that "the discharge of toxic pollutants generated even greater Congressional concern in 1977." 719 F.2d at 645.

Ultimately, the Third Circuit ruled:

> Given the clear congressional concern throughout the 1977 Amendments for discharges of toxic pollutants, we hold that the FDF variances for toxic pollutant discharges are forbidden by the Act.

719 F.2d at 646.

The overall purpose of the legislation is, of course, the appropriate context in which to examine the meaning of Section 301(l)'s ban on modifications of toxic pollutant requirements. *Philbrook* v. *Glodgett*, 421 U.S. 707, 713 (1975); *Weinberger* v. *Hynsan, Westcott, & Dunning, Inc*, 412 U.S. 609, 631-632 (1973).

EPA's reading of Section 301(1) flouts Congress' overriding purpose in enacting the 1977 Amendments. By contrast, the Third Circuit's ruling protects the aquatic environment and human health by compelling industrial dischargers to meet national uniform pretreatment standards without modification.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be affirmed.

Respectfully submitted,

Eldon V.C. Greenberg
(Attorney of Record)
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Washington, DC 20006
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